

LAW OFFICES
JOHN D. HEFFNER, PLLC
1750 K STREET, N.W.
SUITE 200
WASHINGTON, D.C. 20006
PH: (202) 296-3333
FAX: (202) 296-3939

ORIGINAL

227205

BY HAND

Cynthia T. Brown
Chief, Section of Administration
Office of Proceedings
Surface Transportation Board
395 E Street, SW - Suite 1149
Washington, D.C. 20423-0001



ENTERED
Office of Proceedings
JUN 3 2010
Part of
Public Record

RE: STB Docket No. 35381, Rail-Term Corp. - Petition For A
Declaratory Order

Dear Ms. Brown:

On behalf of Rail-Term Corp., I am enclosing for
filing in the above-captioned proceeding an original and
ten copies of its Petition For A Declaratory Order.

You will also find a diskette containing the document
and a filing fee check in the amount of \$1400.00

Please date stamp and return one copy for my records.

Sincerely yours,

John D. Heffner

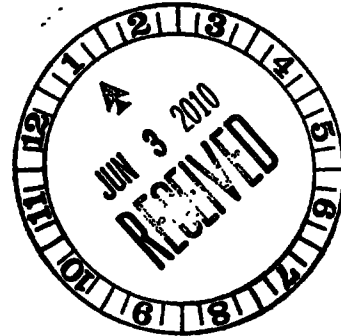
**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35381

**ENTERED
Office of Proceedings**

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**RAIL-TERM CORP.
PETITION FOR A DECLARATORY ORDER**

FILED

JUN 3 - 2010

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JUN 3 - 2010
**SURFACE
TRANSPORTATION BOARD**

Submitted by **SURFACE
TRANSPORTATION BOARD**
John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202)296-3334

Dated: June 3, 2010

Expedited Handling Requested

**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. 35381

**RAIL-TERM CORP.
PETITION FOR A DECLARATORY ORDER**

INTRODUCTION

Pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721(a), Rail-Term Corp. (“Rail-Term”) files this Petition for a Declaratory Order seeking a ruling from the Surface Transportation Board that it is not a “rail carrier” within the meaning of the I.C.C. Termination Act (“ICCTA”), 49 U.S.C. 10102(5). For the reasons stated at the end of this petition, Rail Term also requests expedited handling with a decision rendered on or before 90 days from the date of this filing.

BACKGROUND

Rail-Term is a small privately held Michigan corporation and a subsidiary of Canadian corporation Rail-Term Inc. Rail-Term Inc. and subsidiaries Rail-Term and Centre Rail-Control Inc., are engaged in a variety of business activities that support the railroad industry in both the

United States and Canada. As relevant here, Rail-Term and its sister corporation in Canada, Centre Rail-Control Inc., provide dispatching software and dispatching services for short line and regional freight railroads and for VIA RAIL CANADA, Canada's national passenger railroad.

Neither Rail-Term nor its corporate affiliates own any lines of railroad, operate trains, hold themselves out to provide transportation for compensation, or own, lease, or operate any railroad locomotives or rolling stock.

More specifically, Rail-Term develops computer-based dispatching software and provides dispatching services for several American short line railroads from an office in Rutland, VT. In effect, Rail-Term's rail carrier clients have "outsourced" to Rail-Term the dispatching functions that they would otherwise provide "in house." Rail-Term employs 8 people in its US office and, along with its corporate parent and Canadian sibling, employs about 100 people overall. Rail-Term currently provides dispatching services in the United States for the Vermont Railway System and its affiliates, the Buffalo & Pittsburgh Railroad, and short line holding company, Omni-Trax, Inc., and its subsidiary railroads. Neither Rail-Term, Rail-Term Inc., nor Centre Rail-Control Inc. own, are owned by, or are under common control with any rail carrier in the United States or Canada.

Rail-Term has filed this petition for a declaratory order because of a decision it received on April 6, 2010,¹ from the United States Railroad Retirement Board (“RRBD”) finding it to be a “carrier employer” under the Railroad Retirement Act and the Railroad Unemployment Insurance Act (the “RRA” and the RUIA”). Rail-Term disagrees with the RRBD’s ruling and plans to seek reconsideration of that erroneous ruling by filing both an administrative appeal with the RRBD and, in the event of a second adverse RRBD ruling, by seeking judicial review of that agency’s final decision. Because the RRBD has frequently based its decisions finding an entity subject to coverage under the RRA and RUIA on rulings from the STB, Rail-Term seeks a ruling from this Board that it is not a “rail carrier”² within the meaning of the ICCTA.

Rail-Term’s situation at the RRBD is complicated by the fact that it had been advised several years ago by several senior and now retired or dead RRBD employees that it would not be regarded as a “covered employee” for the purpose of RRA and RUIA coverage. It relied on that advice to its detriment by establishing at considerable cost its own 401(k) employee

¹ Copy attached hereto as Exhibit A and referred to as the RRBD Decision. The RRBD incorrectly referred to Rail-Term as Rail-Term Corporation. The correct name is Rail-Term Corp.

² The ICCTA speaks in terms of a “rail carrier” whereas the RRA and RUIA use the term “carrier by railroad.” Rail-Term believes these terms are legally “fungible” and therefore uses them interchangeably.

retirement program. The RRBD's decision holding Rail Term a "covered employer" puts it in the untenable position of having to deposit substantial and past due sums into the Railroad Retirement system plus any interest and penalties while at the same time "winding down" its 401(k) retirement program. These considerations underscore the need to get a prompt ruling from the RRBD on reconsideration and the need to obtain the STB's guidance as to whether it is a "rail carrier" under the ICCTA.

ARGUMENT

5 U.S.C. 554(e) and 49 U.S.C. 721, give the Board discretion to issue a declaratory order to terminate a controversy or remove uncertainty. See, Norfolk Southern Railroad Company and the Alabama Great Southern Railroad Company-Petition for Declaratory Order, STB Finance Docket No. 35196, decision served March 1, 2010. The issue here is a very novel one: whether a company that supplies services to the railroad industry in the form of train dispatching is a "rail carrier" within the meaning of section 10102(5) of the ICCTA. Rail-Term is filing this Petition to clarify its "rail carrier" status consistent with those courses of action taken by other parties that have been characterized by the RRBD as "rail carriers" under the ICCTA and

therefore “covered employers” for RRA and RUIA purposes.³ See, e.g., H&M International Transportation, Inc.-Petition for Declaratory Order, STB Finance Docket No. 34277, slip op. served November 12, 2003 (H&M), and American Orient Express Railway company LLC-Petition for Declaratory Order, STB Finance Docket No. 34502, slip op. served December 29, 2005(American Orient Express). Rail-Term urges the STB to issue a decision finding that Rail-Term is not a “rail carrier.” Alternatively, the STB could issue a decision declining to grant a declaratory ruling because it is clear from the record that Rail-Term is not a rail carrier subject to the Board’s jurisdiction. H&M, supra, at 2-3.

THE RAILROAD RETIREMENT BOARD DECISION

After citing the pertinent facts supplied by Rail-Term, the RRBD cited the two alternative statutory bases for finding that an entity is a “covered employer” subject to its jurisdiction, namely that the entity is

- (1) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board (“STB”) or
- (2) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service....in connection with the transportation of passengers or property by railroad.”

³ Rail-Term does not seek any guidance from the STB as to its status under the RRA and RUIA, only under the ICCTA.

See, 45 U.S.C. 231(a)(1). The RRBD then went on to say,

“[b]ecause Rail-Term is neither owned by nor under common control with a rail carrier, a majority of the Board finds that it does not fall within the second definition of an employer under the Acts. However, for the reasons explained below, we find that Rail-Term is a carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.” The RRBD Decision at 3.

The RRBD never attempted any analysis or explanation as to how it could reach a conclusion finding coverage under section 231(a)(1) that Rail-Term is “a carrier by railroad” subject to the STB’s jurisdiction. It did not and could not cite to any STB decision finding Rail-Term subject to this Board’s jurisdiction because none exists. Similarly, the RRBD did not find that Rail-Term owns any lines of railroad or railroad equipment, operates any trains on a common carrier or noncommon carrier basis, or holds itself out as any sort of “common carrier.” Rather it came to the conclusion on its own that Rail-Term was “a carrier by railroad” subject to the STB’s jurisdiction because of “the control that dispatchers have over the motion of trains.” The RRBD Decision at 4. More specifically, the RRBD used the following “syllogistic” reasoning to arrive at such an amazing conclusion that defies both reality and logic:

- This is not the first time the Board has found that an entity performing dispatching services for interstate railroad operation is a covered employer⁴
- Dispatching is an “inextricable part” of train motion and a railroad’s common carrier obligation because of the ultimate control that dispatchers have over the motion of trains
- Alternatively, dispatching is such an “integral part” of and so “essential” to operating a railroad that it cannot be contracted out to a third party outside the control of a railroad
- Ergo, Rail-Term is an “employer” for the purpose of the Act

The RRBD based its decision to find Rail-Term a “carrier by railroad” in large part upon the fact that dispatchers are subject to the Hours of Service Act which defines the term “dispatching service employee” and limits the duty hours of a dispatching service employee as well as Federal Railroad Administration regulations promulgated thereunder. But there is nothing in the RRA or RRIA that would permit such an expansive interpretation.

⁴ The RRBD cited two of its cases for that proposition, a readily distinguishable case involving Southern California’s commuter rail agency that *wanted* its dispatchers to be covered under the Railroad Retirement system as an inducement to working for the agency, B.C.D. 02-12, Southern California Regional Rail Authority Segregation of Dispatching Department (2002), copy attached as Exhibit B, and a case that preceded the Rail-Term case by only a few months, Employer Status Determination-Decision on Reconsideration, Trinity Railway Express-Train Dispatching, Herzog Transit Services, Inc. (2009), copy attached as Exhibit C, and is now on appeal in the Seventh Circuit by the vendor providing dispatching services, No. 09-3945, Herzog Transit Services, Inc., Dallas Area Rapid Transit, and Fort Worth Transportation Authority v. United States Railroad Retirement Board.

**RAIL-TERM IS NOT A RAIL CARRIER
UNDER THE ICC TERMINATION ACT**

To suggest that Rail-Term is not “a rail carrier” under the ICCTA belies the obvious. As the STB held in H&M, supra, finding that this company was not “a rail carrier” under the ICCTA,

[t]he Board has jurisdiction over “transportation by rail carrier.” 49 U.S.C. 10501(a). The term “transportation” is defined to include a facility related to the movement of property by rail, and services related to that movement, including receipt, delivery, transfer, and handling of property. 49 U.S.C. 10102(9)(A), (B). A “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation.” 49 U.S.C. 10102(5).

Whether a particular activity constitutes transportation by rail carrier under section 10501 is a fact-specific determination. H&M’s intermodal transloading activity could fit within the broad definition of transportation. [Citations omitted] But this is only half of the statutory requirement for Board jurisdiction under section 10501.

To fall within the Board’s jurisdiction, the transportation activities must be performed by a rail carrier, and the mere fact that H&M moves rail cars inside the Marion facility does not make it a rail carrier. To be considered a rail carrier under the statute, there must be “*a holding out*” [emphasis supplied] to the public to provide common carrier service. [citations omitted] Here, however, H&M’s operations are performed pursuant to agreements with UP that reserve for UP all common carrier rights and obligations and that, in fact, specifically bar H&M from providing common carrier service. Additionally, H&M has never received, nor sought, a license from the Board for common carrier freight rail operations under 49 U.S.C. 10901 (or an exemption from the licensing requirements pursuant to 49 U.S.C. 10502). Further, there is no evidence that H&M has provided any type of rail service to the public for compensation or otherwise, or held itself out as willing to do so. Indeed, the record shows that any rail-related activity performed by H&M is strictly in-plant, for H&M’s

convenience and benefit, and in furtherance of its non-rail primary business purpose.

The other recent principal STB precedent on the issue of what constitutes a “rail carrier” under the ICCTA, American Orient Express, supra, found that an entity providing a “cruise ship type passenger rail excursion service” was a “rail carrier” under the same analysis.

Rail-Term could not possibly be considered “a rail carrier” within the meaning of the ICCTA under H&M and American Orient Express because it does not (1) own or use any facility related to the movement of passengers or property by rail or provide services related to that movement, (2) provide common carrier transportation for compensation, (3) “hold out” to the public to provide transportation for compensation, or (4) hold any license or exemption from the STB to perform common carrier rail operations.

Accordingly, the STB should find that Rail-Term is not a “rail carrier” subject to its jurisdiction and should issue a ruling to that effect.

EXPEDITED HANDLING REQUESTED

Under the RRBD’s Rules of Practice and the governing statutes, Rail-Term has one year from the date of its initial decision or until approximately April 6, 2011, in which to file its petition for reconsideration with that agency. 20 CFR 259.3. It also has 90 days from the date of a final RRBD ruling to seek judicial review of any adverse decision. 20 CFR 259.5.

However, Rail-Term desires to seek reconsideration of the RRBD's initial ruling at the earliest possible date in order to clarify its "limbo" status regarding coverage under the RRA and RUIA. Moreover, Rail-Term desires to be able to use any ruling the STB issues finding that it is not a "a rail carrier" under the ICCTA in its petition for reconsideration to the RRBD and any court appeal. To the best of its knowledge, Rail-Term does not expect any opposition to either its Petition for Reconsideration to the RRBD or to this Petition to the STB. Accordingly, Rail-Term requests that this Board issue a decision within 90 days of receipt of its Petition for a Declaratory Order.

CONCLUSION

Rail-Term requests that the STB expeditiously consider its Petition for a Declaratory Order and either issue a declaratory ruling finding it not to be a "rail carrier" under the ICCTA or, alternatively, issue a ruling declining to

grant declaratory relief on the grounds that Rail-Term is not a "rail carrier" under the ICCTA.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "John D. Heffner", with a stylized flourish at the end.

John D. Heffner
John D. Heffner, PLLC
1750 K Street, N.W.
Suite 200
Washington, D.C. 20006
(202)296-3334

Dated: June 3, 2010

EXHIBIT A

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Employer Status Determination

Rail-Term Corporation

Board Coverage Decision 10-33

April 6, 2010

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This is the determination of the Railroad Retirement Board concerning the status of Rail-Term Corporation as an employer under the Railroad Retirement Act (45 U.S.C. § 231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.) (RUIA). Rail-Term has not previously been held to be an employer under the Acts.

Information about Rail-Term was furnished by John D. Heffner, counsel for Rail-Term. Rail-Term was incorporated March 3, 2000 and began operations in mid-March 2000. It is entirely owned by Rail-Term, Inc., a Canadian corporation. Rail-Term, Inc. is owned by Robert Wheeler, Geoffrey Chambers, and Francois Prenovost. Seventy percent of Rail-Term's business is spent in providing train dispatching services and 25 percent is spent on railroad-related computer software development.

Rail-Term originally began operations in March 2000 as an intermodal terminal operations consultant for Expressway Terminal, LLC, a subsidiary of Canadian Pacific Railway in the United States. Rail-Term disbanded that operation in June 2004 and terminated those employees. Rail-Term has an affiliate established and based in Canada (Centre Rail-Control Inc.) which performs train dispatching services for seven Canadian short line and regional railroads and VIA Rail Canada, which is Canada's passenger carrier.

Rail-Term performs services for Vermont Railway (BA 2114) and four of its affiliates. Green Mountain Railway Company, Clarendon and Pittsford Railroad (B.A. 2103), Washington County Railroad, and New York & Ogdensburg Railway (BA 2272); and for Buffalo & Pittsburg Railroad, Inc. (BA 2249), and its affiliate Rochester & Southern Railroad, Inc. (BA 2247). Twenty-five percent of Rail-Term's business time is spent doing train dispatching for Vermont Railway and its affiliates and 50 percent for Buffalo & Pittsburgh and its affiliate.

Evidence in the coverage file indicates that Rail-Term entered into a Dispatching Services Agreement with Vermont Railway on February 18, 2005 and with Buffalo & Pittsburgh on March 1, 2005.

Rail-Term provides its dispatching services from its dispatching office in Rutland, Vermont. The dispatchers report to the Director of Operations of Rail-Term, who is employed by Rail-Term and is based at the Rutland office. During Rail-Term's initial operations in the United States, Rail-Term temporarily utilized some individuals employed by two of its railroad clients. As of April 28, 2007, all of the dispatchers were on the Rail-Term payroll.

The dispatchers receive their daily directions for train schedules, operations, and restrictions from Rail-Term's Director of Operations. Rail-Term's Director of Operations receives his daily directions from Rail-Term's customers' Operations Managers. Information concerning changes in train operations follows the same channel.

Rail-Term owns its dispatching system. Dispatching is not done on carrier property. While Rail-Term's carrier customers may visit Rail-Term's facilities, they have no right to inspect those facilities. Rail-Term and its customers do not use the train order method of operations. Rail-Term's computerized dispatching software maintains train movement records in accordance with Federal Railroad Administration (FRA) requirements.

Although Rail-Term does not direct the operating personnel of its carrier customers, Rail-Term's dispatchers give the operating personnel authority to occupy track. Rail-Term trains its dispatchers. In response to a question that asked to what extent is any action of the dispatcher imputed to the carrier, Rail-Term responded that it is a third party service provider and is solely responsible for its actions. The FRA will sanction Rail-Term, and not

the carrier, if Rail-Term is deemed responsible for a violation.

No evidence in the coverage file indicates that any railroad has a financial interest in Rail-Term or that any individual owns a controlling interest in Rail-Term and in a carrier. Similarly, the file contains no evidence that an officer or director of Rail-Term is an officer or director of a carrier.

Section 1(a)(1) of the Railroad Retirement Act (45 U.S.C. § 231(a)(1)), insofar as relevant here, defines a covered employer as:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49, United States Code;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad * * *.

Sections 1(a) and 1(b) of the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351(a) and (b)) contain substantially similar definitions, as does section 3231 of the Railroad Retirement Tax Act (26 U.S.C. § 3231).

Because Rail-Term is neither owned by nor under common control with a rail carrier, a majority of the Board finds that it does not fall within the second definition of an employer under the Acts. However, for the reasons explained below, we find that Rail-Term is a carrier employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

It should be noted at the beginning of this discussion that this case does not present to the Board for the first time the question of whether an entity that provides dispatching for interstate railroad operation is a covered employer under the Acts administered by the Board. In our decision in B.C.D. 02-12, issued February 12, 2002, we held that the dispatching department of the Southern California Regional Rail Authority (SCRRA) was a covered employer. Although the evidence in that case demonstrated that the principle business of SCRRA was not rail service, the Dispatching Department was found to be performing rail-related duties. That department was thus segregated under section 202.3 of the Board's regulations and found to be a covered employer effective October 1, 2002. See also our decision on reconsideration upholding the finding that Herzog Transit Services, Incorporated is a covered employer with respect to train dispatching over the rail line of Trinity Railway Express in Texas (B.C.D. 09-53, October 28, 2009).

Train dispatching includes routing and tracking train progress and coordinating the movement of one train with others. A train dispatcher handles two basic types of traffic: trains and maintenance activities [Thomas White, *Elements of Train Dispatching*, Vol. 2 "Handling Trains" 14 (2003)]. Train dispatchers issue specific authority for maintenance of way activity, just as they do for trains [id. p. 14]. Dispatching concerns directing the movement of trains and engines over the railroad through the use of clearances, train orders, manipulation of signals, switches, etc. While Rail-Term and its customers do not use the train order method of operation, Rail-Term's computerized dispatching software achieves the same goal of directing the movement of trains and engines over the track of Rail-Term's customers. Until properly dispatched, the engineer cannot begin movement of the train. Because of the control that dispatchers have over the motion of trains, dispatching is an inextricable part of the actual motion of trains and thereby is an inextricable part of fulfilling the railroad's common carrier obligation.

Train dispatching is an essential element of safe train operation over a rail line. *Canadian Pacific Limited, et al. – Purchase and Trackage Rights – Delaware & Hudson Railway Company*, Surface Transportation Board Finance Docket No. 31700 (Sub. No. 13) December 4, 1998, (employer's transfer of train dispatchers voided due to adverse affect on rail safety). Because the safe operation of trains depends on the work of the train dispatchers, dispatchers are subject to the Hours of Service law enacted by Congress. See 49 U.S.C. § 21101 et seq. Section 21101 defines "dispatching service employee" as follows:

... an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movements. [49 U.S.C. § 21101 (2)].

Section 21105 limits the on duty hours of a dispatching service employee [49 U.S.C. § 21105].

The Federal Railroad Administration, which is charged with the responsibility to carry out the railroad safety duties imposed by the Hours of Service law, has issued regulations that prescribe reporting and record keeping requirements with respect to the hours of service of certain railroad employees, including dispatchers [49 CFR Part 228]. In addition, FRA regulations¹ emphasize the control factor present in the job of a dispatcher. Section 241.5 of those regulations defines the word "dispatch" in pertinent part to mean:

(1) To perform a function that would be classified as a duty of a "dispatching service employee," as that term is defined by the hours of service laws at 49 U.S.C. 21101(2), if the function were to be performed in the United States. For example, to dispatch means, by the use of an electrical or mechanical device -

(i) To control the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or

(ii) To control the occupancy of a track by a roadway worker or stationary on-track equipment, or both; . . .

Traditionally, the work of dispatching has been performed by employees of individual railroads.² However, as is currently the case with many other businesses, some railroads have made a business decision to have dispatching done by a separate entity that specializes in that field of work. Whether the work of dispatching is done by individuals on the payroll of a railroad or by individuals on the payroll of a separate entity, the work is essentially the same: the dispatcher controls the movement of the trains. Because no railroad can fulfill its common carrier obligation unless its trains move, the work of the dispatcher is an integral part of the operation of a common carrier. Thus, because Rail-Term's dispatchers have the ultimate control over the movement of the trains of its rail carrier customers, the Board finds that Rail-Term is itself a rail carrier within the definition of an employer under the Railroad Retirement and Railroad Unemployment Insurance Act. Service for Rail-Term is creditable beginning February 18, 2005, the date it first entered into an agreement to provide dispatching services.

As the dissent suggests, there is an alternate theory that dispatching is such an integral part of operating a railroad that it cannot be contracted out to a third party that is outside of the control of the railroad. Under this analysis Rail Term employees would be found to be employees of the railroads for which Rail Term provides dispatching services.

Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation.

Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service

substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

It should be noted that the tests set forth under paragraphs (B) and (C), above, go beyond the test contained in paragraph (A) and could hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. Under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See *Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 206 F. 2d 831 (8th Cir. 1953). However, see also, *Wabash Railroad Co. v. Finnegan*, 67 F. Supp. 94 (E.D. Mo. 1946), a railroad retirement tax case where the court found that the nature of the services performed for a railroad by its contractors was such that the railroad could not surrender control and supervision in fact, even if it did so in words. 67 F. Supp. at 100. The dispatching services provided by Rail Term are analogous to the services provided by contractors in *Wabash Railroad Co.* in that the dispatching services are of a continuing nature and are so essential to the statutory duty of the rail carriers to provide rail transportation that the carriers must retain the power to direct and control the individuals who conduct the dispatching service.

The Board has applied this principle in its decision with respect to the coverage status of Rail-West, Inc. (B.C.D. 95-51). We noted in that decision that: "The law of agency recognizes that certain duties owed to third parties are so essential under the law that responsibility for their proper performance must be retained by the principal or employer." See Restatement (Second) of Agency, § 214. In *Rail-West*, we held that the individuals provided by Rail-West as crew to operate the trains of the rail division of the Port of Tillamook Bay were covered as employees of that rail division because the Port had to retain ultimate control of the performance of its service as a common carrier. In the case of Rail Term, because a railroad cannot properly discharge its duties as a common carrier without dispatching services, dispatching services fall under this same rule of agency; i.e., they are so essential to the role of common carrier by railroad that responsibility for their proper performance must be retained by the railroad.

In addition, by the nature of the work that dispatchers perform, they are integrated into the railroad's operations. Without the services of the dispatcher, the railroad's trains cannot run. The job of a dispatcher is as critical to the operation of a railroad as is that of a locomotive engineer. Because dispatching is an inextricable part of the railroad's fulfilling its common carrier obligation, we find that the dispatchers who work for Rail Term could be considered to be employees of each railroad for which Rail Term provides dispatching services. Cf. B.C.D. 86-75, *Genesee Valley Transportation Company, Inc.*

Under either analysis, dispatchers who work for Rail Term would be considered to be covered employees under the Acts administered by this Board.

Original signed by:

Michael S. Schwartz

V.M. Speakman, Jr.

Jerome F. Kever (Dissenting
Opinion attached)

**MANAGEMENT MEMBER KEVER'S DISSENT
RAIL-TERM CORPORATION**

A majority of the Board found Rail-Term to be a covered employer under the Railroad Retirement Act (RRA) and the Railroad Unemployment Insurance Act (RUIA). While I may agree with the majority that dispatching is an "inextricable part" of railroad operations, I can not agree with the majority that Rail-Term is itself a carrier under our Acts.

The Railroad Retirement Act (45 U.S.C. § 231 (a) (1)) (substantially the same as the RUIA) defines a covered employer as:

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under Part A of subtitle IV of title 49; United States Code;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with one or more employers as defined in paragraph....

The majority finds Rail-Term to be a covered employer under subsection (i) above. Further, the majority cites Southern California Regional Rail Authority (SCRRA) B.C.D. 02-12 and Herzog Transit Services, Inc. B.C.D. 09-53 (Decision on Reconsideration - Management Member Kever Dissenting) as precedent supporting their conclusion. Because I do not believe that Rail-Term would be considered a carrier by the Surface Transportation Board (STB) under Part A of title 49 and also do not find the above cited decisions applicable to this case, I must dissent.

The Board's decision outlines the nature of dispatching and its relationship to other railroad operations. It also presents examples of how dispatching is regulated by federal agencies including the Federal Railroad Administration. However, the decision does not provide a basis upon which Rail-Term could actually be found to be an entity regulated under the jurisdiction of the STB. In *American Orient Express Railway Company, v. Surface Transportation Board*, 484 F.3d 554 (D.C. Circuit 2007) the Court did not disturb the STB's finding that an entity that did not own tracks or utilize its own employees for movement of passenger trains could still be considered a railroad carrier where it provided its own rail cars and contracted with AMTRAK to move its passengers. Rail-Term may participate in directing car movements by dispatching, but it has not provided rail cars nor participated in interchange agreements or other arrangements to move freight.

The majority decision also cites two prior Board decisions in SCRRA and Herzog Transit Services as support for its determination. These decisions present facts very different than the instant case since both applied factors from the Board's decision in *Railroad Ventures, Inc.* B.C.D. 00-47. In the initial Board decision on *Herzog Transit Services*, B.C.D. 09-02, the Board summarized the SCRRA decision and concluded that since SCRRA had assumed the responsibility for part of the railroad operations (dispatching for both intrastate and interstate carriers) that it became covered consistent with the *Railroad Ventures*' analysis. The Board's initial determination of Herzog goes on to analyze Herzog Transit under the *Railroad Ventures* factors and concludes that Herzog, as operator for DART, became covered upon their assuming the dispatching function which includes interstate passenger and freight trains. Unlike SCRRA and Herzog, Rail-Term does not own track nor provide train operations over leased track as in Herzog's case. Providing dispatching services by SCRRA and DART/Herzog changed their covered status because they owned track upon which interstate rail traffic moved along with their intrastate commuter operations. This is a very different factual situation than exists in Rail-Term.

While the majority certainly had the authority to find dispatching to be an integral part of railroading that could not be contracted out similar to engineers and conductors (see *Rail-West, Inc.* B.C.D. 95-51), the majority also chose to find Rail-Term itself to be a carrier

which I do not believe is supportable under the Acts; therefore I dissent.

Note - Reference to the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers in footnote (2) of the majority opinion is not relevant since rail unions are subject to coverage under different statutory provisions than rail carrier employers under the RRA and the RUIA.

Original signed by:

Jerome F. Kever

¹ 49 CFR Part 241, "United States Locational Requirement for Dispatching of United States Rail Operations."

² It is noteworthy that the American Train Dispatchers Department of the International Brotherhood of Locomotive Engineers is an AFL-CIO affiliated craft union representing employees in the nation's railroad industry who operate and dispatch trains and supply the electric power for those railroads which use electricity for train propulsion and signaling. It is also an employer covered by the Railroad Retirement and Railroad Unemployment Insurance Acts (B.A. No. 8905).

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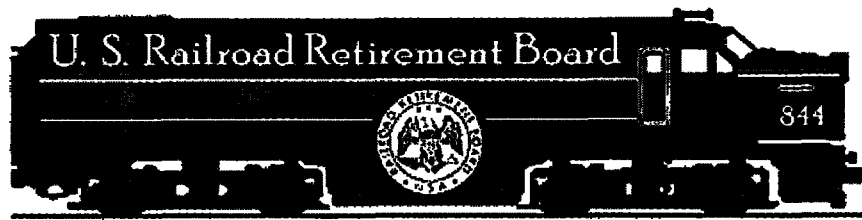
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B.C.D.02-12

FEB 12, 2002

EMPLOYER STATUS DETERMINATION

Southern California Regional Rail Authority Segregation of Dispatching Department

This is the decision of the Railroad Retirement Board with respect to a request by the Southern California Regional Rail Authority (SCRRA) that the Board rule as to whether its employees that will be organized into the Dispatching Department are covered by the Railroad Retirement Act (45 U.S.C. §231 et seq.) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §351 et seq.) (RUIA). Specifically, SCRRA has requested the Board to address the status of the dispatch employees who currently work for AMTRAK and who would be hired as employees of SCRRA in its Dispatching Department. The Dispatching Department will be established effective October 1, 2002. The dispatchers will be responsible for dispatching all traffic on SCRRA's lines, which consist of: (1) Metrolink intrastate commuter lines; (2) the "Coaster" intrastate commuter train administered by public transit agencies in San Diego County; (3) AMTRAK interstate and intercity passenger trains; and (4) Burlington Northern Santa Fe and Union Pacific interstate freight trains. SCRRA also requests that the Dispatching Department be segregated for coverage purposes in accord with 20 CFR 202.3.

Background Information

In Board Coverage Decision (B.C.D.) No. 94-116, issued December 14, 1994, the Board found that the SCRRA was not an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts. That decision was based on the Board's finding that SCRRA is a governmental entity that is charged with the administration of commuter rail operations in Southern California. SCRRA operates no trains but contracts that function to AMTRAK. Based on previous agency decisions that had held that a public entity that lacks the capability of operating a railroad but rather contracts with an employer under the Acts to operate the rail line is not a covered employer under the Acts, the Board found that SCRRA was not an employer under the Acts.

A recent Board Coverage Decision in Railroad Ventures, Inc. (B.C.D. 00-47, November 7, 2000) refined the standard that the Board would use to determine when an entity that has its railroad functions performed by another would be found to be an employer under the Acts. In Railroad Ventures, the Board set forth a three-part test that it would use to determine the employer status of such an entity. The

three-part test is as follows:

- 1) whether the entity does not have as a primary purpose to profit from railroad activities;
- 2) whether the entity does not operate or retain the capacity to operate the rail line;
- 3) whether the operator of the rail line is already covered under the RRA and RUIA. B.C.D 00-47, at pages 4-5.

SCRRA would continue not to be an employer under the three-part test set forth in Railroad Ventures. SCRRA is a public entity charged with the provision of commuter rail service in Southern California. As such, it does not have as a primary purpose to profit from rail activities. Its primary purpose is the provision of rail commuter service, rather than any profit from that service. SCRRA does not retain the capacity to operate a rail line. Finally, SCRRA has contracted with AMTRAK, an employer under the Acts, to operate the trains. In conclusion, even under the test set forth in Railroad Ventures, SCRRA remains not covered by the RRA and the RUIA.

Future Activities

According to the record before us, the Dispatching Department is to be established October 1, 2002. That Dispatching Department will employ former employees of AMTRAK. The former AMTRAK employees previously provided dispatch services for SCRRA on a contract basis. Effective October 1, 2002, SCRRA has decided to provide its own dispatching services rather than rely on AMTRAK for this service. AMTRAK will continue to provide other railroad services on a contract basis.

Before deciding whether the Dispatching Department will be an employer under the Acts administered by the Board, we must address the issue of whether the Board should at this time issue a ruling or delay until the Dispatching Department actually begins operations. In a recent decision, the Board provided a coverage opinion with regard to future operations. See Keokuk Electric Railway, Inc., B.C.D. 01-83 (December 3, 2001). As in that case, there is no doubt that the Dispatching Department will begin operation October 1, 2002. In order to provide for as smooth a transition as possible, a decision by the Board regarding the coverage status of the Dispatching Department will facilitate rail operations in the United States. Therefore, the Board will issue a decision regarding the Dispatching Department at this time.

Discussion

As noted in the background information, SCRRA is not an employer under the RRA and the RUIA. As noted above, SCRRA's principal business is not as a rail carrier employer under the RRA and the RUIA, but rather, SCRRA is a public entity charged with the provision of commuter rail service in Southern California. Section 202.3 of the Board's regulations states that:

- (a) With respect to any company or person principally engaged in business other than carrier business, but which, in addition to such principal business, engages in some carrier business, the Board will require submission of information pertaining to the history and all operations of such company or person with a view to determining whether some identifiable and separable enterprise conducted by the person or company is to be considered to be the employer. The

determination will be made in the light of considerations such as the following:

- (1) The primary purpose of the company or person on and since the date it was established;
 - (2) The functional dominance or subservience of its carrier business in relation to its non-carrier business;
 - (3) The amount of its carrier business and the ratio of such business to its entire business;
 - (4) Whether its carrier business is a separate and distinct enterprise.
- (b) In the event that the employer is found to be an aggregate of persons or legal entities or less than the whole of a legal entity or a person operating in only one of several capacities, then the unit or units competent to assume legal obligations shall be responsible for the discharge of the duties of the employer. (Emphasis supplied.) (20 CFR 202.3).

Information provided regarding SCRRA, demonstrates clearly that SCRRA is not principally engaged in the railroad business and that segregation is applicable to SCRRA. The number of employees employed in the Dispatching Department will be less than 14% of SCRRA's total employees.

The Dispatching Department will be an identifiable and separable enterprise. The Dispatching Department will have a separate payroll. Employees in the Dispatching Department will be supervised solely by the Dispatching Manager. It is the intent of SCRRA to maintain strict personnel separation between the Dispatching Department and the rest of SCRRA's operations. Employees not assigned to the Dispatching Department will have no involvement with dispatching.

In summary, the Board finds that the evidence of record overwhelmingly demonstrates that the principle business of SCRRA is not rail service. The Dispatching Department, however, will be performing rail related duties. As provided for in section 202.3 of the Board's regulations, the Dispatching Department is properly segregated from the other activities of SCRRA. The Board finds that the Dispatching Department will be a covered employer under the RRA and the RUIA effective October 1, 2002, and its employees' service and compensation should be reported to the Board accordingly.

Cherryl T. Thomas

V. M. Speakman, Jr.

Jerome F. Kever



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Employer Status Determination Decision on Reconsideration Trinity Railway Express - Train Dispatching Herzog Transit Services, Incorporated Board Coverage Decision 09-53 October 28, 2009

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This is the decision on reconsideration of the Railroad Retirement Board (hereinafter the Board) of a part of its determination dated January 20, 2009 (B.C.D. 09-2) pursuant to 20 CFR 259.1 concerning the status of South Florida Regional Transportation Authority (SF RTA), Herzog Transit Services, Incorporated (Herzog Transit), and Trinity Railway Express (Trinity) as employers under the Railroad Retirement Act (45 U.S.C. § 231 et seq.)(RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. § 351 et seq.)(RUIA) (the RRA and RUIA are hereinafter collectively referred to as "the Acts").

INITIAL DECISION

In its decision dated January 20, 2009, the three-member Board determined as follows: (1) a majority of the Board, Labor Member Speakman dissenting, determined that SF RTA is not a covered employer under the Acts (Determination #1); (2) a majority of the Board, Management Member Kever dissenting, determined that Herzog Transit is a covered employer only with respect to train dispatching over the rail line of Trinity Railway Express in Texas (Determination #2); and (3) a majority of the Board, Management Member Kever dissenting, determined that Trinity itself is not a covered employer to the extent the train dispatching operations conducted on Trinity's behalf are reported by Herzog Transit (Determination #3).

On April 17, 2009, Herzog Transit, Dallas Area Rapid Transit ("DART"), and Fort Worth Transportation Authority ("The T") (collectively "Petitioners") filed with the Secretary to the Board a Joint Petition for Reconsideration of Board Coverage Determination ("B.C.D.") 09-02 pursuant to 20 C.F.R. § 259.3(a). In its joint petition, Petitioners requested the Board to reconsider and reverse determination #3 in B.C.D. 09-02 and find that Herzog Transit dispatchers providing those services to Trinity are not covered under the Acts without disturbing determination #2 that Trinity itself is not covered. Additionally, Petitioners requested a stay of any applicable requirements to report service and compensation pending the Board's decision in the Joint Petition for Reconsideration of B.C.D. 09-02. For the reasons explained below, on reconsideration the majority of the Board, Management Member Kever dissenting, affirms and adopts its initial decision dated January 20, 2009, with respect to determinations #2 and #3 with the following additional comments. The Board does not disturb or reconsider determination #1.

DISCUSSION

Initially, it should be noted that Petitioners, in their joint petition for reconsideration, do not raise any new issues which were not previously adjudicated by the three-member Board in its January 20, 2009 initial decision. However, in their joint petition for reconsideration Herzog Transit, DART, and the T specifically make the following arguments: (1) Rather than applying the Railroad Ventures test, the Board should have determined the status of the Herzog Transit dispatchers in accordance with 45 U.S.C. §231(b)(1)(i) and prior Board decisions; (2) The Herzog Transit dispatchers are not subject to the continuing authority or control of a covered rail carrier under 45 U.S.C. §231(b)(1)(i)(A); (3) The Herzog Transit dispatchers are employed by an independent contractor engaged in an independent trade or business and therefore, the "integration" tests under 45 U.S.C. §231(b)(1)(i)(B) and (C) do not apply; and, (4) The Board's decision would have unintended adverse consequences.

Essentially, three of the four arguments made in the Petition for Reconsideration maintain that the Board should have decided this case (i.e., Determinations #2 and #3) by using an

analysis of whether or not the service performed constituted employee service for a rail carrier covered by the Acts administered by the Board. The majority of the Board, Management Member Kever dissenting, concludes on reconsideration that the initial decision correctly chose to analyze this case as a determination of employer status – i.e., directly addressing the issue of whether the companies involved are employers as defined in the Railroad Retirement and Railroad Unemployment Insurance Acts.

The Board has both policy-making and quasi-judicial functions. In its policy-making role, the Board establishes and promulgates rules and regulations to resolve matters arising under the Acts it is charged with administering. In its quasi-judicial role, the Board decides controversies of fact and law in accordance with the Acts and the Board's regulations. The Board is authorized by section 7 of the RRA to establish and promulgate rules and regulations. See 45 U.S.C. § 231f(b)(5). Specifically, section 7(b)(5) of the RRA states as follows:

"The Board shall establish and promulgate rules and regulations to provide for the adjustment of all controversial matters arising in the administration of this Act. All rules, regulations, or decisions of the Board shall require the approval of at least two members, and they shall be entered upon the records of the Board, which shall be a public record."

Accordingly, the Board is authorized to create and enforce the rules and regulations necessary to implement and enforce the Acts, with the full force of a law. Through proposed rulemaking and the promulgation of regulations the Board issues agency statements of general or practical applicability and future effect designed to implement, interpret, or prescribe law or policy or describe the organization, procedure, or practice requirements of the agency. Additionally, under section 7 of the RRA, the Board is responsible for regulating future conduct of either groups of persons or a single person. Based on this premise, a decision regarding a company's status as a covered employer under the Acts must be made based on the law, and not on the equities, as was clearly set forth in the Hearing Examiner's report.

Petitioners argue that that Board was incorrect in applying the Railroad Ventures test, but rather should have determined the status of the Herzog Transit dispatchers in accordance with 45 U.S.C. § 231(b)(1)(i) and prior Board decisions, specifically citing *Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 206 F.2d 831 (8th Cir. 1953). The Board's initial decision did not apply the *Kelm* decision to Trinity's contract with Herzog Transit because the majority determined that the question in this case was not the service performed by the employees, but rather concerned the activity conducted by their employer, Herzog Transit, on behalf of Trinity. The initial Board decision determined the specific issue to be not whether individuals on the payroll of the contractor are statutory employees of a railroad under RRA sections 1(b)(1) and 1(d)(1) and RUIA sections 1(d) and 1(e), but rather was whether the contractor itself is a rail carrier employer under RRA section 1(a)(1) and RUIA section 1(a).

On reconsideration, the majority of the Board, Management Member Kever dissenting, concludes that the initial decision correctly viewed the nature of the activity conducted by Herzog as determinative of the type of analysis the Board used in reaching the initial decision as well as the holding of that decision. Dispatching is essential to operation of a railroad. A dispatcher controls train movement. No train can move until a dispatcher gives it permission to move. In addition to the reasoning set forth in the initial decision, the majority notes on reconsideration that as part of the mission of the Federal Railroad Administration (FRA) to ensure safe train operation, the FRA regulates the number of hours that a dispatching employee may work pursuant to authority set out in the hours of service laws. (See 49 U.S.C. § 21101 et seq.). The definition section of the law defines "dispatching service employee" to mean:

... an operator, train dispatcher, or other train employee who by the use of an electrical or mechanical device dispatches, reports, transmits, receives, or delivers orders related to or affecting train movement. 49 U.S.C. § 21101(2).

Regulations issued by the FRA emphasize the control factor present in the job of a dispatcher. More specifically, section 241.5 of those regulations defines the word dispatch in pertinent part to mean:

(1) To perform a function that would be classified as a duty of a "dispatching service employee," as that term is defined by the hours of service laws at 49

U.S.C. 21101(2), if the function were to be performed in the United States. For example, to dispatch means, by the use of an electrical or mechanical device –

(i) To control the movement of a train or other on-track equipment by the issuance of a written or verbal authority or permission affecting a railroad operation, or by establishing a route through the use of a railroad signal or train control system but not merely by aligning or realigning a switch; or

(ii) To control the occupancy of a track by a roadway worker or stationary on-track equipment, or both . . . (49 CFR 241.5)

It is by virtue of the control that a dispatcher exerts over train movement that the dispatcher operates the train. Train dispatching includes routing and tracking train progress, and coordinating the movement of one train with others. Rail safety depends upon many other factors, such as proper track and signal maintenance, and even the purchase of proper equipment. These activities, however necessary though, impact on train operation indirectly and may be required to be performed while trains are not running (e.g., removal and replacement of track). In contrast, dispatching concerns directing the movement of trains and engines over the railroad through the use of clearances, train orders, manipulation of signals, switches, etc. It should be noted that railroad dispatchers shoulder more responsibilities today than ever due to changes in technology, operating practices and the economy. As such, dispatching is as inextricable a part of the actual motion of trains as is the operation of a train's locomotive controls by the engineer. Further, until properly dispatched, the engineer cannot begin movement of the train.

Dispatchers control the movement of freight or passengers over rail lines. Herzog does not, itself, operate the trains, but it does direct engineers in the movement of trains. Without an order from a dispatcher, a train does not move and cannot deliver its freight or passengers. What we are talking about here is a crucial component of the movement of freight or passengers from point A to point B. In other words, a railroad cannot fulfill its obligation to provide rail service without dispatching services.

The majority of the Board also notes on reconsideration that under common law, a common carrier is the insurer of the goods it contracts to deliver. It contracts to safely transport goods as a part of its common carrier obligation to the shipper. Moreover, the Interstate Commerce Act imposes liability on carriers for the goods they transport. Dispatching service is an indispensable component of carrier service and must be delivered as a part of carrier service. Similar to the situation where a carrier contracts with another entity to operate its trains, which results in the Board finding the contractor to be an employer, a contractor that provides the essential operating service of dispatching for an employer may be found to be an employer under the RRA and RUIA. In BCD 02-12, the Board held that a commuter authority that provided dispatching services for the Union Pacific, Amtrak, and Burlington Northern Santa Fe was a covered employer with respect to the "carrier services", i.e. dispatching, that it provided to the Union Pacific, Amtrak, and BNSF. In BCD 03-38, the Board found that a company that provided temporary operating personnel, including engineers, conductors, trainmen, and dispatchers, to a rail carrier employer was itself a rail carrier employer. In reaching its decision in BCD 03-38, the Board cited an earlier decision in BCD 03-23 that had concluded that an entity that contracts to provide rail operations on behalf of another is an employer.

The majority of the Board finds on reconsideration that dispatching services are critical to the performance of a carrier's obligation to provide rail service. Where, as in this case, the train dispatching includes trains that operate interstate, the entity dispatching trains operates as a rail carrier within the meaning of the definition of an employer under the Railroad Retirement and Railroad Unemployment Insurance Acts.

CONCLUSION

In summary, the majority of the Board finds on reconsideration that Trinity's rail line is used in interstate freight rail service. If Trinity conducted all aspects of this freight service, it would be a covered employer; if Trinity conducted none of the freight service and merely held ownership of the rail line, Trinity would not be a covered employer. The facts are that rather than contracting all aspects of the freight service together, Trinity split the leased freight activity into two parts: operation of freight locomotives is leased to four rail carriers, while dispatching of those locomotives and their trains is contracted to Herzog Transit. Under Railroad Ventures removing this aspect of rail carrier operation from the covered

freight rail carriers cannot remove that portion of the operation from coverage. The majority of the Board, Management Member Kever dissenting, finds on reconsideration that Herzog Transit is a rail carrier employer under the RRA and RUIA as lessee of the train dispatching operation over the Trinity rail line. Because Herzog Transit's principal business is operation of intrastate passenger rail service, however, only the dispatching unit under the contract with Trinity is the enterprise which is considered to be the employer under the regulations of the Board. 20 CFR § 202.3(a).

Petitioners argue that the Board's decision would have unintended adverse consequences for other similarly-situated entities. However, the Board makes decisions concerning a company's status as a covered employer under the Acts based on the particular set of facts before it. In other words, the outcome of each coverage decision is determined by the unique facts relevant to the company being considered. Moreover, the means by which the Board has chosen to rule on this issue, i.e., an adjudication, limits application of the ruling to this particular case. While the interpretation of law in this decision may certainly serve as a precedent for a future case, it does not necessarily decide the outcome when these principles are applied to a future case. Rather, the Board would consider the particular facts before deciding a future case involving the same or a similar issue. Accordingly, this argument set forth by Petitioners is without merit.

Last, contained in this request for reconsideration dated April 15, 2009, and again renewed in a letter dated April 22, 2009 to the Secretary to the Board, counsel for Petitioners requested a stay of any applicable requirements to report service and compensation pending the Board's decision in the Joint Petition for Reconsideration of B.C.D. 09-02. The Board granted the requested stay in a letter dated July 28, 2009. That stay will cease to be effective on the date that this decision is issued.

Based on the above stated reasons, the majority of the Board, Management Member Kever dissenting, affirms and adopts on reconsideration its initial decision of January 20, 2009, and concludes that Herzog Transit is a covered employer only with respect to train dispatching over the rail line of Trinity Railway Express in Texas and that Trinity itself is not a covered employer to the extent the train dispatching operations conducted on Trinity's behalf is reported by Herzog Transit.

The Board notes that Herzog Transit began conducting the train dispatching operation effective January 1, 2001. When evidence is that a company met the definition of a covered railroad employer some years prior to the date of the Board's decision, service is creditable only as permitted by section 9 of the RRA and section 211.16 of the Board's regulations. Section 9 generally states that returns of service and compensation are conclusive four years after the date the return is required to be filed. Regulations of the Board require a return to be filed by the last day of February of the year following the year for which service is reported. 20 CFR 209.8. At the time the Board issued its initial decision on January 20, 2009, the 4 year limitation period under RRA section 9 had not run for service performed in calendar 2004. Accordingly, on reconsideration the majority of the Board orders that Herzog Transit file returns of service with respect to dispatching service employees beginning January 1, 2004.

The petition for reconsideration is denied.

Original signed by:

Michael S. Schwartz

V.M. Speakman, Jr.

Jerome F. Kever (Dissenting opinion attached)

JEROME F. KEVER
MANAGEMENT MEMBER

DISSENT

Trinity Railway Express – Dispatching

Herzog Transit Services, Inc.
Docket Item: 09-CO-0019

I dissent from the portion of the majority's decision that affirms the Board's initial determination finding dispatchers working for Herzog Transit Services to be covered under the Railroad Retirement Act and the Railroad Unemployment Insurance Act.

Original signed by:

Jerome F. Kever
Management Member

Date 10/14/09

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